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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1952. No. .

HARVEY A. MILLER,

Petitioner,

v.

EDMUND LEE JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Harvey A. Miller, now the sole defendant, prays for a writ of *certiorari* to review a final judgment of the United States Court of Appeals for the Third Circuit entered on March 25, 1953.

I. Summary and Short Statement of the Matter Involved.

This petition is for the review, on writ of *certiorari*, of the judgment of the Court of Appeals for the Third Circuit affirming the judgment of the District Court for the Western District of Pennsylvania, which entered judgment for the respondent (the plaintiff in the proceedings below), thereby deciding two important questions of local Pennsylvania law in conflict with the applicable decisions and statutes of that Commonwealth.

The matter involved arises from the following undisputed facts:

Miller, the defendant, was the *attorney of record* of Williams (Findings of Fact Nos. 4-5, R. 111a-112a) and as such recovered a judgment for him from the Pittsburgh Terminal Coal Co. (Complaint, Par. II, R. 6a-7a, Answer, Par. 2, R. 18a, 20a). Williams died and his administratrix engaged Miller to collect the judgment (R. 85a, 86a-88a). Miller collected the judgment in installments (R. 90a-91a, 94a-95a), and paid the first installment (less approved deductions) over to the administratrix (R. 87a) who thereupon filed a first and partial account in the Orphans' Court of Indiana County, Pennsylvania. Jones had been employed by Williams to assist in the preparation of his case (R. 160a), but he was never employed in any capacity by the administratrix after Williams' death (R. 88a, 90a, 139a). Upon learning the estate was insolvent he claimed to be entitled to a lien on the fund accounted for by the administratrix and made such claim at the audit of the account in the Orphans' Court of Indiana County (R. 74a) which, under the law of Pennsylvania, had exclusive jurisdiction of the distribution of the decedent's estate. The auditor to whom the court referred the question ruled Jones had no lien and rejected his claim for priority, but allowed his claim as a *general* creditor (R. 78a-79a). The Orphans' Court confirmed the auditor's report. Jones took no appeal and accepted his share of the fund then distributed (R. 82a).

Thereafter Miller received the balance of the judgment by check drawn to him as *attorney for the administratrix* (R. 165a) and (as he was under Pennsylvania law duty bound to do) paid the same over to the administratrix (R. 144a) who filed a final account of which Jones had notice. Jones did not renew his claim for priority but accepted further distribution from that fund as a general creditor (R. 83a).

Thereafter Jones sued Miller for the difference between what he received from the estate and what he claimed to be his total bill on the theory that Miller ignored his notice of

lien and should have withheld the sum Jones claimed from the funds collected for and paid to the administratrix.

The U. S. District Court for the Western District of Pennsylvania, which gained jurisdiction because Jones was a citizen of West Virginia, found for Jones (R. 110a-120a) and the Court of Appeals for the Third Circuit affirmed on appeal (R. 172, 186).

II. Jurisdiction.

The jurisdiction of this Court to review the questions herein presented is invoked under the Act of Congress of June 25, 1948, c. 646, 62 Stat. 928, as amended (28 U. S. C. 1254(1)). The judgment of the United States Court of Appeals for the Third Circuit, which was entered on March 25, 1953, became final on April 27, 1953, upon the denial of the petition for rehearing.

III. Questions Presented.

1. Whether the Court of Appeals erred in failing to follow the decedents' estates' law of Pennsylvania. That law is: An attorney for an administrator of a decedent's estate is but an agent, and payment to him in that capacity is payment to the estate. No creditor of the estate claiming a lien can compel such an attorney to withhold funds of the estate by giving notice of a claimed lien. Such claimant is required by the law of Pennsylvania to submit his claim to the Orphans' Court which *alone* has jurisdiction to pass on such claims and on distribution of the estate.

2. In such a case, where the lien claimant did in fact submit his claim of lien to the Orphans' Court which rejected it, is not that court's decision so far *res judicata* under the Pennsylvania law as to bar a personal action against the estate's attorney for refusing to obey claimant's notice of lien?

Both of these questions were raised in every stage of the proceedings below.

IV. Reasons Relied on for the Granting of the Writ of Certiorari.

In affirming the judgment of the trial court, the Court of Appeals for the Third Circuit has decided an important question of local law of Pennsylvania in a way which is in conflict with applicable local decisions and statutes, in that:

1. It has misconceived or failed to follow the controlling applicable decisions of the Pennsylvania courts of last resort, which hold that

> A lawyer who represents a fiduciary of a decedent's estate, and as such collects money on a judgment due that estate, is in duty bound to pay the same over to the estate, and cannot be compelled, at the peril of personal liability and summary discipline, to withhold the amount of a claimed lien; the creditor's remedy being to assert his claim in the Orphans' Court, which alone has exclusive jurisdiction to pass on such claims.

Appeal of Odd Fellows Savings Bank, 123 Pa. 356, 364; 16 Atl. 606 (1888);
Thomas, et al., Trustees v. Johnson, Trustee, et al., 356 Pa. 570, 572; 52 Atl. 2d 663 (1947);
Watts's Estate, 158 Pa. 1; 27 Atl. 861 (1893);
Huff's Estate, 299 Pa. 200, 210; 149 Atl. 179 (1930);
McGettrick's Appeal, 98 Pa. 9, 12 (1881);
McCahan's Estate, 312 Pa. 515; 168 Atl. 685 (1933);
Pa. Act of 1917, P. L. 363, Sec. 9(e); 20 P. S. 2245;
Pa. Act of 1836, P. L. 784; 17 P. S. 2046.

2. It has misinterpreted the Pennsylvania rule of *res judicata*, by which the final decision of a court of competent jurisdiction, to a cause there litigated on the merits, is conclusive and *res judicata* as between all parties to the litiga-

tion *and their privies,* regardless of subsequent shuffling of plaintiffs on the record, or change in the character of the relief sought.

Wallace's Estate, 316 Pa. 148, 153; 174 Atl. 397 (1934);
Rice v. Braden, 243 Pa. 141, 149; 89 Atl. 877 (1914);
Newbold's Estate, 65 Pa. Superior Ct., 151, 155 (1916);
O'Connor v. O'Connor, 291 Pa. 175, 180; 139 Atl. 734 (1927).

The decisions of the highest Pennsylvania State Court are controlling on the federal courts in respect to all matters not governed by the Federal Constitution or by Acts of Congress. Failure of the court below to follow that rule is a ground in itself on which this Court may grant and has granted a writ of *certiorari* resulting in reversal of the lower court for such failure.

Erie Railroad v. Tompkins, 304 U. S. 64; 82 L. ed. 188; 58 S. C. 817 (1937);
Cohen v. Beneficial Loan Assn., 337 U. S. 541, 545; 93 L. ed. 1528; 69 S. C. 1221 (1949);
Leach & Co. v. Peirson, 275 U. S. 120, 127; 72 L. ed. 194; 48 S. C. 57 (1927).

WHEREFORE, your petitioner respectfully prays that a writ of *certiorari* be issued under the seal of this Court, directed to the United States Court of Appeals for the Third Circuit, commanding said court to certify and send to this Court on a day designated, a full and complete transcript of the record and all proceedings of the said Court of Appeals had in this cause, to the end that this cause may be reviewed and determined by this Court, and the judgment of the said Court of Appeals reversed, and that your petitioner may be granted such other and further relief as to this Court may seem proper.

GROVER C. LADNER,
Counsel for Petitioner.

COMMONWEALTH OF PENNSYLVANIA,
COUNTY OF PHILADELPHIA, } *ss.:*

GROVER C. LADNER, being duly sworn, deposes and says that he is the counsel for the petitioner herein; that he has read the foregoing petition; and that the matters therein stated are true to the best of his knowledge, information and belief.

GROVER C. LADNER.

Sworn to and subscribed before me this 22nd day of June, 1953.

FLORENCE M. RIDGEWAY,
(SEAL) *Notary Public.*
My commission expires January 7, 1955.

PETITIONER'S BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. Opinions of the Courts Below.

The opinion of the District Court is not reported. It appears at pp. 110a-120a of the Record as Findings of Fact, Conclusions of Law and Order.

The opinion of the Court of Appeals has not been reported to date, and appears near the end of the record filed herewith (R. 166-171).

II. Jurisdiction.

1. The judgment to be reviewed was dated March 25, 1953 and the petition for rehearing was denied April 27, 1953 (R. 186).

2. The statute under which jurisdiction is invoked is the Act of Congress of June 25, 1948, c. 646, 62 Stat. 928, as amended (28 U. S. C. 1254(1)).

III. Statement of the Case.

Inasmuch as a statement of the case necessarily has been given under the heading "Summary and Short Statement of the Matter Involved" at pp. 1-3 of the Petition, a restatement is omitted in the interest of brevity.

IV. Specification of Assigned Errors.

The United States Court of Appeals for the Third Circuit erred:

1. In holding that the defendant, who was duty bound, under the applicable law of Pennsylvania, to pay over to the administratrix of a Pennsylvania decedent's estate funds

belonging to the estate and collected by him as attorney for the estate, is nevertheless liable to the plaintiff for failure to withhold from the fund the amount claimed by the plaintiff as a lien upon the fund.

2. In failing to hold, in accordance with Pennsylvania law, that a final decision on the merits by the Orphans' Court of Indiana County, Pennsylvania, which had exclusive jurisdiction of the assets of a decedent's estate and of all claims against them, that the plaintiff had no lien on certain funds belonging to the estate which were collected by the defendant as attorney for the estate, is *res judicata* with respect to the plaintiff's claim against the defendant for damages for failure to withhold from the estate the amount claimed as a lien.

3. In affirming the judgment of the District Court in favor of the plaintiff.

4. In failing to reverse the judgment of the District Court and to enter judgment for the defendant.

V. Summary of Argument.

The petitioner makes the following contentions:

1. The defendant, an attorney, cannot be held liable for damages in a federal court for failure to do that which would have subjected him to personal liability and summary discipline in the State court having competent jurisdiction of the defendant with respect to such act.

A. The Orphans' Court of Indiana County, Pennsylvania, had exclusive jurisdiction of the decedent's estate, its assets, their distribution, and claims against the estate and its assets.

B. The defendant, as attorney for the administratrix, was but the agent of the administratrix; and payment to him as such attorney was payment to the estate.

C. Under Pennsylvania law, an attorney for a decedent's estate may not withhold funds collected by him for the estate to enforce a lien for services, and is subject to summary discipline if he does so.

D. Doing his duty under the law of Pennsylvania by which he is bound cannot subject the defendant to liability in damages for performance of such duty.

2. The plaintiff, having made his claim of lien on the funds collected by the defendant, in the Orphans' Court of Indiana County, Pennsylvania, which had full and exclusive jurisdiction of the subject matter and of the parties and their privies, and that court, after a full hearing on the merits, having entered a final adjudication, not appealed, that the plaintiff had no lien on such funds, is concluded by *res judicata* from holding the defendant liable in damages for failing to withhold part of such funds under the plaintiff's claim of lien.

A. Under Pennsylvania law, *res judicata* applies to all parties to the earlier litigation and *their privies*, which includes all present parties who actually had an opportunity to appear and assert their rights.

B. Although the Orphans' Court proceedings were in the record name of the estate, and the plaintiff's claim there was against the estate in name, the administratrix was the representative of the estate, and the defendant, as attorney for the estate, stood in privity with it and with the administratrix.

C. The final decision of the Orphans' Court that the plaintiff had no lien on the funds collected by the defendant is conclusive and *res judicata* as between plaintiff and defendant in the present action.

VI. Argument.

Point No. 1.

The defendant, an attorney, cannot be held liable for damages in a federal court for failure to do that which would have subjected him to personal liability and summary discipline in the State court having competent jurisdiction of the defendant with respect to such act.

A. *The Orphans' Court of Indiana County, Pennsylvania, had exclusive jurisdiction of the decedent's estate, its assets, their distribution, and claims against the estate and its assets.*

The ruling of the court below is both shocking and appalling, and upsets the law of, and the orderly procedure in, decedents' estates as it has stood for well over 100 years. That law is that when a person dies all his assets and debts due him pass to his personal representative (administrator or executor as the case may be) in trust for the benefit first, of decedent's creditors, and then for the distributees entitled. An administrator is under bond and must file an account. That account is advertised and must come before the Orphans' Court for audit. That Court has exclusive jurisdiction to pass on the nature, character and amount of claims of creditors which claims must be presented at the audit: Act of 1917 P. L. 363 Sec. 9(e), 20 P. S. 2245 which codified and reenacted the earlier law of 1836, P. L. 792. This section of the law which commits to the Orphans' Courts of Pennsylvania "the jurisdiction of the distribution of assets and surplusage of the assets of decedents among creditors and others interested," was held in *McGettricks' Appeal*, 98 Pa. 9, 12 (1881) to mean that the Orphans' Court has exclusive jurisdiction to distribute estates of decedents among those entitled to them. See also *McCahan's Estate*, 312 Pa. 515; 168 Atl. 685 (1933).

B. *The defendant, as attorney for the administratrix, was but the agent of the administratrix; and payment to him as such attorney was payment to the estate.*

The settled law of Pennsylvania is that an attorney for a fiduciary of a decedent's estate is but the agent of such fiduciary. Payment to him is payment to the fiduciary and therefore payment to the estate. The lawyer has absolutely no right to withhold funds paid to him in that capacity: *Appeal of Odd Fellows Savings Bank*, 123 Pa. 356, 364, 16 Atl. 606 (1888), cited and followed in *Thomas, et al. Trustees v. Johnson, Trustee, et al.*, 356 Pa. 570, 572, 52 Atl. 2d 663 (1947); *Fulweiler v. Pantazis, et al.*, 77 Pa. D. & C. 577, 584 (1951); *McHenry Estate*, 65 Pa. D. & C. 330, 333, 334 (1948); and see especially, *Watts's Estate*, 158 Pa. 1, 27 Atl. 861 (1893), and *Huff's Estate*, 299 Pa. 200, 210, 149 Atl. 179 (1930), where it is expressly stated that "The administrator's attorneys of record were merely his agents."

C. *Under Pennsylvania law, an attorney for a decedent's estate may not withhold funds collected by him for the estate to enforce a lien for services, and is subject to summary discipline if he does so.*

The attorney for the estate may not withhold funds so collected by him even to enforce a lien for his own services. His remedy is to require an account to be filed and to present his claim at the audit. See *Yonker's Estate*, 20 Pa. D. R. 362 (1911) where this principle was enforced by summary proceedings. See also Act of 1836, P. L. 784, 17 P. S. 2046 which authorizes summary proceedings against attorneys withholding funds. What Mr. Miller (the defendant here) could not do for himself, he obviously could not do for another.

D. *Doing his duty under the law of Pennsylvania by which he is bound cannot subject the defendant to liability in damages for performance of such duty.*

If this decision is not reviewed and reversed, it means that a lawyer for an estate is placed on the horns of a dilemma. If he withholds a fund at the request of a claimant he could be disbarred. If he does not, the claimant can make him personally liable. That is not the law of Pennsylvania.

POINT No. 2.

The plaintiff, having made his claim of lien on the funds collected by the defendant, in the Orphans' Court of Indiana County, Pennsylvania, which had full and exclusive jurisdiction of the subject matter and of the parties and their privies, and that court, after a full hearing on the merits, having entered a final adjudication, not appealed, that the plaintiff had no lien on such funds, is concluded by *res judicata* from holding the defendant liable in damages for failing to withhold part of such funds under the plaintiff's claim of lien.

A. *Under Pennsylvania law, res judicata applies to all parties to the earlier litigation and their privies, which includes all present parties who actually had an opportunity to appear and assert their rights.*

The learned court below misinterpreted the Pennsylvania rule of *res judicata*. In *Wallace's Estate*, 316 Pa. 148, 153, 174 Atl. 397 (1934), the rule is stated as follows:

> ". . . the rule of res judicata is that when a court of competent jurisdiction has determined a litigated cause on its merits, the judgment entered, until reversed, is, forever and under all circumstances, final and conclusive as between the parties to the suit *and their privies*, in respect to every fact which might

properly be considered in reaching a judicial determination of the controversy, and in respect to all points of law there adjudged, as those points relate directly to the cause of action in litigation and affect the *fund* or other subject-matter then before the court. As we said in Hochman v. Mortgage Finance Corp., 289 Pa. 260, 263, 'The thing which the court will consider is whether the ultimate and controlling issues have been decided in a prior proceeding in which the present parties actually had an opportunity to appear and assert their rights. If this be the fact, then the matter ought not to be litigated again, nor should the parties, by a shuffling of plaintiffs on the record, or by change in the character of the relief sought, be permitted to nullify the rule.' " (Emphasis supplied)

B. ***Although the Orphans' Court proceedings were in the record name of the estate, and the plaintiff's claim there was against the estate in name, the administratrix was the representative of the estate, and the defendant, as attorney for the estate, stood in privity with it and with the administratrix.***

The specific error of the court below was to overlook the word "*privies*" in its holding that there was no identity of parties. Who were the parties in the controversy in the Orphans' Court? It was a decedent's estate proceeding, and as that estate was insolvent, the plaintiff's claim was not merely against the estate, but also against every other creditor or claimant against the estate, of which Mr. Miller, the defendant, was one. Miller, moreover, as lawyer for the administratrix stood in privity with the estate and of the administratrix.

". . . where the decree of a court of competent jurisdiction has passed upon a question in which different persons are interested, such decree is conclusive

against all parties to the controversy who had a right and opportunity to be heard." *Rice v. Braden,* 243 Pa. 141, 149, 89 Atl. 877 (1914).

"To render a decree conclusive it is not necessary to be against one by name; it is enough that it is against his interest: Taylor v. Cornelius, 60 Pa. 187." *Newbold's Estate,* 65 Pa. Super. Ct. 151, 155 (1916).

C. *The final decision of the Orphans' Court that the plaintiff had no lien on the funds collected by the defendant is conclusive and res judicata as between plaintiff and defendant in the present action.*

Edmund Lee Jones, prior to September 28, 1935 filed a claim against the Estate of S. A. Williams for professional services and disbursements between June 5, 1925 and February 28, 1935 in the amount of $10,095 (Plaintiff's Exhibit 40, R. 74a; Offered, R. 141a-142a), and after the hearing thereon before the auditor, served notices upon Miller and Nesbitt, dated September 28, 1935 (R. 14a-15a; admitted, R. 21a) and December 13, 1935 (R. 16a-17a; admitted, R. 21a-22a; Offered, R. 121a-122a). The latter notice recited the $10,095 claim and asserted a lien in the following language (R. 17a):

"You are, therefore, notified that I claim a lien, or right of defalcation, on the said funds now in or hereafter coming into your hands in the amount aforesaid, *and you are likewise notified to retain in your hands a sufficient amount to protect my aforesaid claim pending determination thereof by a proper tribunal.* Will you kindly govern yourself accordingly and keep me advised as to your action in the premises." (Emphasis supplied.)

Thereafter the auditor filed his report rejecting Jones' claim for lien or priority but allowing his claim as general

creditor (Plaintiff's Exhibit 40, R. 79a; Offered, R. 141a-142a). Exceptions were filed to this report by Jones, the plaintiff (R. 82a). Later a second and final account was filed of which Jones had notice and he was awarded a further dividend *as a general creditor,* which he accepted (R. 83a) and as to which he filed no exceptions although exceptions were filed to the auditor's second report as to other matters by other parties (Defendant's Exhibit B, R. 37a-46a; admitted, R. 60a). On May 14, 1940, Judge Creps, sitting as the Orphans' Court, dismissed all exceptions as to both reports and confirmed the same absolutely. (Defendant's Exhibit C, R. 47a-51a; admitted, R. 60a). No appeal was taken by Jones from these decrees (Answer, Par. 16, R. 30a; admitted, Reply, Par. 16, R. 60a) which became a final judgment and conclusively ruled he was entitled to no lien or priority.

Thus after having pursued to the fullest extent his claim for lien or priority against the *funds* which Miller had turned over to the Williams Estate, and having failed to recover priority, Jones then proceeded to sue Miller for failing to obey the notice to retain enough funds to cover Jones' lien claim for services. He well knew Miller had no such right to withhold any funds collected and paid to him, Miller, in his capacity as attorney for the estate. Further, Jones also knew that any right which he had to the funds in Miller's hands, he could and did pursue into the administrator's hands by asserting his claim thereto in the Orphans' Court. Having submitted the question of his claim of lien to that court distributing these funds, he must certainly be bound by its decision and cannot now recover indirectly against Miller what he could not recover directly against the fund distributed by the court.

The law of Pennsylvania forbids such procedure. As stated in *O'Connor v. O'Connor,* 291 Pa. 175, 180, 139 Atl. 734 (1927):

> "As said by Judge Hare, approved by this court, in Appeal of Third Reformed Dutch Church, 88 Pa.

503, 505: 'Judgments not only bind parties but privies, or, in other words, persons who, though not actually before the court, are yet in contemplation of law represented by those who appear or have been duly summoned.' 'Privies are those whose relationship to the same right of property is mutual or successive. In other words, privity denotes mutual or successive relationship to the right of property, title or estate. It may be in blood, in law, or in estate': Strayer v. Johnson, 110 Pa. 21, 24. 'All persons are privies to a judgment, whose succession to the rights of property adjudicated or affected, are derived through or under some one of the parties to the action . . . To render a decree conclusive it is not necessary to be against one by name; it is enough that it is against his interest.': Newbold's Estate, 65 Pa. Superior Ct. 151, 155. Hence, as stated in Peterson v. Lothrop, 34 Pa. 223, 228: 'The equitable owner of a chose in action is estopped by the verdict and judgment [in a suit by or against the legal owner], even though not named, in the same manner as though he had been a party on the record.' "

This then is clearly a case for the application of the principle that the binding effect of a prior adjudication is not to be defeated by minor differences of form, parties or allegations in the later proceeding, nor by shuffling of plaintiffs on the record thereof, nor by change in the character of relief sought thereby. The binding effect "applies with the same strictness when the new cause of action, while not technically the same as the old, nevertheless is so related that some matter essential to a recovery in the new proceeding was in fact determined in the earlier one." *O'Connor v. O'Connor, Supra,* at p. 185.

VII. Conclusion.

From the foregoing it appears that the Court of Appeals for the Third Circuit has decided two important questions of the local law of Pennsylvania, each in a way that is in conflict with applicable State decisions. First, it results in subjecting to liability in the federal courts an attorney for a Pennsylvania decedent's estate for doing precisely what he is required to do by Pennsylvania law, under peril of personal liability and summary discipline. Second, it disregards the Pennsylvania law of *res judicata* by adhering to technical niceties of form and ignoring substance, in direct conflict with express decisions of the highest court of Pennsylvania.

It is earnestly urged that the petition be granted.

Grover C. Ladner,
Counsel for Petitioner.

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Supreme Court, U.S.
FILED
JUL 13 1953
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 142

HARVEY A. MILLER, Petitioner,

v.

EDMUND LEE JONES, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

CARL E. GLOCK,
JAMES R. ORR,
REED, SMITH, SHAW & McCLAY,
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5 American Jurisprudence, sec. 37, page 282 5
7 Corpus Juris Secundum, sec. 113, page 946 5
Jones on Liens, 3rd ed., sec. 144, page 130 5
2 Mechem on Agency, 2d ed., sec. 2269, page 1844 ... 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 142

HARVEY A. MILLER, Petitioner,

v.

EDMUND LEE JONES, Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI

OPINIONS OF THE COURTS BELOW

The opinion of the District Court is unreported. It is found at pages 110a-120a of the record filed herein, as Findings of Fact, Conclusions of Law and Order. The opinion of the Court of Appeals for the Third Circuit appears at R. 166-171, and is reported in 203 F. 2d 131.

JURISDICTION

Jurisdiction is sought to be invoked under the Act of Congress of June 25, 1948, c. 646, 62 Stat. 928, as amended (28 U.S.C.A. 1254(1)).

COUNTER SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

The undisputed facts, as found by the District Court, as far as they are pertinent to the matters raised in the present petition for certiorari, are these. Respondent, a West Virginia attorney, gained S. A. Williams as a client in 1913 (R. 111a). In October 1924 respondent represented Williams in connection with some of the preliminaries and execution of a contract between Williams and B. F. Hoffacker, the latter being agent for an undisclosed principal (R. 111a). Thereafter respondent rendered legal services for Williams in performing the contract and instituting litigation for breach of the contract (R. 111a). Petitioner entered the controversy in 1931, when suit was entered by Williams against Pittsburgh Terminal Coal Corporation, Hoffacker's undisclosed principal (R. 111a).

Respondent, as Williams intended, continued to act as Williams' counsel, together with petitioner, and later petitioner's present counsel, in the Pittsburgh Terminal litigation (R. 112a). Williams died on July 4, 1934, after he had obtained a judgment for $142,561.31 against Pittsburgh Terminal, and four months before this Court denied a writ of certiorari sought by Pittsburgh Terminal, thus ending the litigation (R. 112a). The judgment was collected by petitioner over a period of time and in installments (R. 113a). Respondent filed a claim against the estate of Williams for legal services and expenses in the Pittsburgh Terminal litigation and was allowed $10,095.00 as a general creditor (R. 114a).

Questions Presented.

On September 28, 1935 respondent notified his co-counsel, petitioner, that he claimed a lien on the funds then in, or later coming into, his hands as proceeds of the judgment (R. 114a), but petitioner thereafter turned over to the Orphans' Court almost $40,000.00 of such proceeds without notifying respondent or honoring his lien (R. 114a-116a). Respondent received from Williams' estate about two-thirds of the amount so allowed him and filed this suit against petitioner to recover the balance due (R. 115a).

The District Court entered judgment for respondent against petitioner in the sum of $2,194.84 with interest from August 31, 1940 (R. 119a). The judgment was affirmed by the Court of Appeals for the Third Circuit (203 F. 2d 131).

QUESTIONS PRESENTED

Petitioner presents only two questions, both of which are governed by Pennsylvania law. We restate them as follows:

1. Does counsel, who was employed by a client to conduct a case to conclusion or judgment, have a retaining lien against funds coming into the hands of his co-counsel from the judgment after their client's death?

2. By filing a claim against the estate of a deceased client to determine the amount due him on a *quantum meruit* basis, and accepting from the estate part of the amount found due him for such services, is counsel deprived of his retaining lien by the principle of *res judicata*?

ARGUMENT

1. Respondent's right to a retaining lien on funds in or coming into the hands of petitioner, which funds were proceeds of the judgment respondent was engaged to obtain, was unaffected by Williams' death.

Petitioner does not contest the trial court's finding that respondent was acting as co-counsel with him for Williams in the Pittsburgh Terminal litigation, and that Williams intended and expected that respondent would continue to represent him to final judgment (R. 112a); nor does petitioner question the trial court's conclusion that respondent had completed his portion of duties as counsel at the time of Williams' death (R. 117a).

The law has been long settled in Pennsylvania that an attorney has a retaining lien on monies in his possession which he has collected for his client, and that he may deduct his fees before paying over the balance to his client: Balsbaugh v. Frazer, 19 Pa. 95; McKelvy's and Sterrett's Appeals, 108 Pa. 615; Lancaster Trust Company's Case, 323 Pa. 107, 186 A. 367; Lemington B. &. L. Ass'n. v. Weddell, 115 Pa. Superior Ct. 114, 174 A. 673.

After respondent gave notice to petitioner to protect respondent's retaining lien, respondent's retaining lien fastened on the funds then in, or thereafter coming into, the hands of his co-counsel, and petitioner could properly have paid respondent what was due him for professional services rendered in the Pittsburgh Terminal litigation: Balsbaugh v. Frazer, supra; Moscarelli v. Wakefield, 54 Pa. Superior Ct. 368; 2 Mechem on Agency,

2d ed., page 1844, section 2269; Jones on Liens, 3rd ed., page 130, section 144.

The death of the client did not terminate respondent's authority as an attorney, for he was employed to conduct the case to judgment and he was not superseded as counsel by Williams' personal representative: Stewart's Estate, 358 Pa. 434, 58 A. 2d 42; 7 Corpus Juris Secundum, page 946, section 113; 5 American Jurisprudence, page 282, section 37; Circuit Court's Opinion, 203 F. 2d 131, 134.

Petitioner's argument that he had no right to retain for himself or respondent any amount from the proceeds of the judgment they obtained, is not borne out by the cases (none of those cited by petitioner involved a retaining lien) nor by his own actions. Of the approximately $130,000 collected by May 9, 1935, petitioner retained over $40,000 for himself and paid Ladner (his present counsel) more than $11,000, all without prior approval of the Orphans' Court of Indiana County, which had jurisdiction of Williams' estate. (R. 115A, Circuit Court Opinion R. 167). What petitioner could do and did for himself and Ladner, he refused to do for respondent. The Pennsylvania Act of 1836, P. L. 784, 17 P. S. 2046 has no application where an attorney withholds, in good faith, what is due as counsel fees: Kraus's Case, 322 Pa. 362, 185 A. 737.

2. The decision of the Orphans' Court was not res judicata of respondent's right against petitioner.

Respondent's services to Williams were to be paid on a *quantum meruit* basis (R. 113a). He was required to have the value of those services determined by the

court having jurisdiction over Williams' estate, which was the Orphans' Court of Indiana County, Pennsylvania (R. 113a).

The Orphans' Court decision denying respondent's right to a lien on the fund in the hands of Williams' personal representative was, in no sense, *res judicata* of the question as to respondent's right to a retaining lien on the proceeds of the Pittsburgh Terminal judgment then in or thereafter coming into the hands of petitioner, his co-counsel. Pennsylvania rulings are consistent that to constitute *res judicata* four identities must be present, *viz*: (1) the thing sued for, (2) the cause of action, (3) the persons and parties to the action and (4) the quality in the persons for or against whom the claim is made: American Surety Co. of N. Y. v. Dickson, 345 Pa. 328, 28 A. 2d 316; Cameron Bank v. Aleppo Township, 338 Pa. 300, 13 A. 2d 40. As stated in the Opinion of the Court of Appeals—"In the first place, the identities necessary for the application of this doctrine do not exist. The parties are not the same and the cause of action is different, to mention only two elements which are absent. In the Orphans' Court the claim was against the estate, while here it is against a lawyer; the former claim was to enforce a lien, here damages are sought for failure to honor a lien." (R. 170, 203 F. 2d 134).

Petitioner's position that the Orphans' Court decision as to the estate funds is conclusive on respondent is obviously correct. But the present suit does not in any manner involve the funds in the hands of the administratix; it is a claim against a lawyer for failing to honor a properly expressed retaining lien of his co-

counsel against monies in the hands of the lawyer before he turned it over to the administratrix, not against a fund in the hands of Orphans' Court. The Orphans' Court ruling was as to the funds under its jurisdiction, and that only (R. 78a, 117a, 170, 203 F. 2d 134).

Conclusion.

Respondent respectfully submits that the decision of the Circuit Court of Appeals is in accord with the applicable decisions of Pennsylvania courts, and that the petition for writ of certiorari is without merit and should be denied.

Respectfully submitted,

CARL E. GLOCK
JAMES R. ORR
REED, SMITH, SHAW & MCCLAY,

Counsel for Respondent.